INDEX

AUTHORITIES CITED

STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 112

E. E. GENTRY,
Petitioner,

vs.

THE STATE OF NORTH CAROLINA
Respondent.

Brief of the State of North Carolina, Respondent, Opposing Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Petitioner, E. E. Gentry, seeks, by writ of *certiorari*, to have the Supreme Court of the United States review a decision of the Supreme Court of North Carolina affirming a judgment of the Superior Court of Caldwell County, North Carolina, imposing sentence upon the Petitioner based upon a conviction for the crime of embezzlement under the North Carolina statute. The opinion of the Supreme Court of North Carolina was filed March 24th, 1948, and is reported as STATE v. E. E. GENTRY, 228 N. C. 643; 46 S.E. (2d) 863.

FACTS

The State's evidence discloses that the witness, Woodrow Price, had purchased a Chevrolet car in Baltimore and refinanced it there. He came to North Carolina the latter part of 1945 while still owing $437 on the car. He went to see the Petitioner and asked about refinancing the car. While in Baltimore, the witness Price had given a Baltimore finance company the paper title to the car as security for his debt (R. p. 4).

The Petitioner told the witness Price that he would refinance the car and pay the debt to the Baltimore company for a charge of $25 and directed the witness Price to fill out and sign a paper. The paper, which was a Borrower's Statement, State's Exhibit A, was filled out and signed by Price (R. p. 5). Price signed another paper at the direction of the Petitioner and gave both papers to the defendant. The second paper was a statement of a loan from the National Trading Company, Exhibit B. Both of these papers were left with the Petitioner. The Petitioner was also given Price's receipt book from the National Investment Company of Baltimore, which was the company which had refinanced Price's car in Baltimore (R. pp. 6 and 7).

Two weeks later, Price made a payment of $40 to the Petitioner. The Petitioner first said that he would send the money to the National Trading Company and later said that he had sent it to Baltimore. Two weeks later, the Petitioner told Price where he had obtained the money to send to Baltimore (R. p. 8).

The State then offered in evidence the registration card, Exhibit C, which identified Price's Chevrolet car and corroborated his previous statements that he had owned a car (R. p. 8). The State then offered in evidence a note

and mortgage, Exhibit D (R. pp. 9 and 10). Price testified that one of the signatures on the papers which purported to be his was not his signature. He identified the signature of the Petitioner on the paper and said that the other signature was his and that he signed it at the Petitioner's place of business (R. p. 8).

Price also stated that at the time he made the payments to the Petitioner, he had received two receipts, Exhibits E and F (R. pp. 11 and 12).

After this, the Petitioner told Price that he had received $500 from the National Trading Company and had sent it to Baltimore by company check, and that the title to the car should have already arrived. Later, the Petitioner said that he had sent his personal check to the "Baltimore Company." The National Investment Company of Baltimore took Price's Chevrolet car in March, 1946, because the payments had not been made on the refinancing loan which they had made to Price in Baltimore (R. p. 12).

Price accused the Petitioner of not sending any money to the "Baltimore Company", and the Petitioner did not deny it. The Petitioner said that he was not going to pay back the money. The Petitioner admitted to Price that he had taken the papers to the National Trading Company and had received $500 from them (R. p. 13). The Petitioner told Price that he did not have anything to show that he had sent a check to the "Baltimore Company" (R. p. 15).

Luther Bolick, Manager of the National Trading Company, stated that the loan was made in cash rather than in check, and that it was granted on acceptance of the papers marked State's Exhibit D. The witness Bolick stated that $500 in cash was paid to the Petitioner and that his company still held the mortgage and note (R. p. 14).

The defendant offered no evidence.

ARGUMENT

THE SUFFICIENCY OF THE EVIDENCE TO BE SUBMITTED TO THE JURY PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

When a state court judicially determines that there is sufficient evidence of a fact to be submitted to a jury, its decision is not reviewable by the United States Supreme Court on writ of *certiorari*.

Noble v. Mitchell, 164 U.S. 367; 41 L.ed. 472;

American Railway Exp. Co. v. Kentucky, 273 U.S. 269; 71 L.ed. 639;

Bell Telephone Co. v. Pennsylvania Public Utility Commission, 309 U.S. 30; 84 L.ed. 563;

In BELL TELEPHONE CO. v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, 309 U.S. 30, 32; 84 L.ed. 563, it is stated in a *per curiam* opinion:

> "As to the first contention, it appears that the state court heard the appeal judicially and decided that there was evidence justifying the finding of the Commission of unreasonable discrimination in the transaction of its intrastate business. In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question."

The following paragraph from the opinion of Justice White in NOBLE v. MITCHELL, 164 U.S. 367, 373; 41 L.ed. 472 would seem to be decisive of the question:

> "It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error. DOWER v. RICHARDS, 151 U.S. 659 (38:306); RE BUCHANAN, 158 U.S. 31 (39:884)."

If it should be determined that the Supreme Court of North Carolina erroneously decided the case, no question would be presented for determination by this Court for it has long been held that where a party is fully heard in the regular course of judicial proceedings, an erroneous decision of the state court is not a denial of due process within the Fourteenth Amendment of the Constitution of the United States.

Bonner v. Gorman, 213 U.S. 86; 53 L.ed. 709;
American Railway Express Co. v. Kentucky, 273 U.S. 269; 71 L.ed. 539;
West Ohio Gas Co. v. Public Utilities Commission, 294 U.S. 63; 79 L.ed. 761;

In AMERICAN RAILWAY EXPRESS CO. v. KENTUCKY, 273 U.S. 269; 71 L.ed. 639, it is said, at page 273:

> "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law."

II.

THE SUPREME COURT OF NORTH CAROLINA HAD A RIGHT TO CONSTRUE THE EMBEZZLEMENT STATUTE OF THE STATE AND TO DECIDE THAT THIS

CASE FELL WITHIN THE PURVIEW OF THE EMBEZZLEMENT STATUTE, AND NO FEDERAL QUESTION IS PRESENTED BY THIS PART OF PETITIONER'S ARGUMENT.

The Petitioner quotes the Embezzlement Statute in force in North Carolina and argues that the Respondent failed to prove that the property alleged to have been embezzled was the property of the prosecuting witness, Woodrow Price. This does not raise any Federal question since the Supreme Court of North Carolina had the right to pass upon the sufficiency of the evidence and to decide what cases, based upon various sets of facts, do or do not fall within the purview of the Embezzlement Statute of North Carolina.

Buchalter v. New York, 319 U.S. 427; 87 L.ed. 1492;
Howard v. Fleming, 191 U.S. 126; 48 L.ed. 121;
Howard v. Kentucky, 200 U.S. 164; 50 L.ed. 421;
Twining v. New Jersey, 211 U.S. 78; 53 L.ed. 97;
Snyder v. Massachusetts, 291 U.S. 97; 78 L.ed. 674;
Chaplinsky v. New Hampshire, 315 U.S. 568, 574; 86 L.ed. 1031, 1036.

III.

THE INTRODUCTION OF THE CHATTEL MORTGAGE IN EVIDENCE, AND ITS COMPETENCY AS EVIDENCE IS NOT A FEDERAL QUESTION.

Objections to the competency or relevancy of evidence in a state court involve the application either of the general or local law of evidence and, as such, furnish no ground for review or interposition by this Court.

Buchalter v. New York, 319 U.S. 427; 87 L.ed. 1492;

Adamson v. California, 332 U.S. 46; 67 S. Ct. Rep. 1672, 1679;

Lizenba v. California, 314 U.S. 219, 227; 86 L.ed. 166;
Barrington v. Missouri, 205 U.S. 483; 51 L.ed. 890;
Sherman v. Grinnell, 144 U.S. 198; 36 L.ed. 403;
Brooks v. Missouri, 124 U.S. 394; 31 L.ed. 454.

The Petitioner Gentry agreed with the prosecuting witness, Woodrow Price, that he would procure certain money for Price in order that Price could pay off and discharge a debt against his automobile, which obligation had been made in Baltimore. It was necessary for Price to pay the Baltimore company and clear the title of his automobile so he could obtain a certificate of title and license in North Carolina. For the purpose of procuring the money, the Petitioner Gentry had Price to sign various papers which are set forth in the Record. On R. p. 5 will be found Exhibit A, which is a Borrower's statement. On R. p. 7 will be found Exhibit B, which is signed by Price and is a statement of account. On R. p. 8, Exhibit C, which is a registration card which Price obtained in the State of Maryland, will be found; and this was required under the Maryland law.

We come now to Exhibit D about which the Petitioner complains. This begins on page 9 of the Record, and the Court will see that this is a combination of a chattel mortgage and note. All of these papers, except the registration card, were signed at the Petitioner Gentry's place of business and at his suggestion in order that the Petitioner Gentry could obtain the money for Price. On R. p. 8, the Court will observe that the witness Price stated that he did not sign his name where it appears at the end of the chattel mortgage. (See middle of page 10.) He testified

that the name "E. E. Gentry" (R. p. 10) was Gentry's signature; and he testified that he did sign the note which is attached to and a part of the same instrument as the chattel mortgage, which signature appears at the bottom of the note on R. p. 10. We thus have the situation where Price was anxious to procure the money and signed any and all papers which the Petitioner Gentry suggested. For some reason, he did not sign his name at the bottom of the chattel mortgage although he did sign his name on the same paper at the bottom of the promisory note. The Court will see that Luther Bolick, who was Manager of the National Trading Company, testified (R. pp. 13 and 14) that there was paid to the Petitioner Gentry $500 in cash and that Exhibit D, which contains the mortgage and note, was held by them as collateral and that there had been three payments made on this loan and that these payments had been credited to the prosecuting witness, Woodrow Price.

We thus have this situation as to the chattel mortgage: The prosecuting witness testified that the name appearing at the bottom of the mortgage was not his signature. He testified, however, that he did sign the note attached to the mortgage and appearing immediately after same and that these papers were all left with the Petitioner Gentry. The evidence of Bolick, the Manager of the National Trading Company, justifies the inference that Gentry brought these papers to him; and he gave the Petitioner Gentry $500 in cash and accepted the papers as collateral, and the payments made were placed to the credit of Woodrow Price, the prosecuting witness. There is no evidence, as a technical proposition, that the mortgage was forged. Price simply says that the name appearing at the bottom of the mortgage is not his signature. He never, at any time,

testified that the signature appearing at the bottom of the mortgage was not authorized by him. Irrespective of who signed the mortgage, the circumstances disclosed by the evidence show that the paper was, at all times, in the possession of the Petitioner Gentry until he transferred it to the National Trading Company and received the money that belonged to Price. We, therefore, cannot escape the inference that the Petitioner Gentry himself knows who placed the signature at the bottom of the mortgage; and this he could have explained very easily had he elected to testify at his trial. We especially call the Court's attention to the fact that the Petitioner Gentry has never testified or given any explanation in this case.

The Supreme Court of North Carolina, in its opinion, passed on this point. On R. p. 38, it will be found that Mr. Justice Winborne, speaking for the Court, said:

> "Defendant also bases other assignments of error upon general exceptions taken to the admission of the Exhibits A to F. The principal argument is that these exhibits are hearsay evidence. It appears, however, that the existence of such papers tended to corroborate the witness Woodrow Price, and were competent for that purpose. It will not be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted. Rule 21 of Rules and Practice in the Supreme Court, 221 N. C., 544. Here the record on the present appeal does not show that any such request was made by appellant. Hence, in the admission of the exhibits in evidence, no error is made to appear."

The Rule of Practice of the Supreme Court of North Carolina referred to in above quotation will be found in 221 N. C. 544, 558, and reads in part as follows:

> " . . . nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted."

It will be seen, therefore, that the Supreme Court of North Carolina considered that these documentary exhibits were competent to corroborate the prosecuting witness, and they were admitted for such purpose only. The Petitioner did not ask to have this evidence restricted when it was admitted and, therefore, under the rule of Court, waived any right to this restriction. Thus, under the North Carolina practice, the evidence was competent; and no request for restriction being made, it could be considered generally for all purposes.

State v. Walker, 226 N.C. 458; 38 S.E. (2d) 531;
State v. Petree, 226 N.C. 78; 36 S.E. (2d) 653.

It will thus be seen that there is, therefore, no analogy or comparison between this case and those cases passed upon by this Court involving perjured testimony. We have already pointed out that the Supreme Court of North Carolina has decided that the essentials of embezzlement were made out by the State through its evidence and that there is no Federal question involved on this point. The admission of the testimony complained about by the Petitioner was disposed of in accordance with settled local procedure; and, therefore, no question on the admission of the evidence is presented for decision by this Court.

Van Oster v. Kansas, 272 U.S. 465; 71 L.ed. 354;
Liberty Warehouse Co. v. Burley Tobacco Co-op. M. Association, 276 U.S. 71; 72 L.ed. 473;
United Gas Public Service Co. v. Texas, 303 U.S. 123; 82 L.ed. 702.

The decision of the Supreme Court of North Carolina is sustained by its own cases.

State v. Lancaster, 202 N.C. 204; 16 S.E. (2d) 367;
State v. Rawls, 202 N.C. 397; 162 S.E. 899;
State v. McLean, 209 N.C. 38; 182 S.E. 700;
State v. Howard, 222 N.C. 291; 22 S.E. (2d) 917.

IV.

THE SUPREME COURT IS WITHOUT JURISDICTION TO GRANT THE WRIT OF CERTIORARI, FOR THE PETITIONER FAILED TO SET UP A CLAIM OF RIGHTS, PRIVILEGES, OR IMMUNITIES UNDER THE CONSTITUTION OF THE UNITED STATES IN THE STATE COURTS.

Although an attempt has been made to show that the questions set out in the Petition for writ of *certiorari* are not Federal questions or are not of sufficient substance and importance to justify the allowance of the writ, the State of North Carolina also contends that this Court is without jurisdiction to allow the petition, for the petitioner failed to set up any of these questions *as questions arising under the Constitution of the United States* in the State courts.

Careful examination of the Record will show that, although the Petitioner took exceptions to alleged errors of law, he failed entirely to set up specially any rights, privileges, or immunities claimed under the Constitution of the United States in either the trial court or the Supreme Court of North Carolina. The opinion of the Supreme Court of North Carolina (R. 33) treats the exceptions taken by the Petitioner as raising questions of State law only. No Federal questions are mentioned. The petition for writ of

APPENDIX

Section 14-90, General Statutes of North Carolina:

Embezzlement of property received by virtue of office or employment.—If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, or any other fiduciary, or any officer or agent of a corporation, or any agent, consignee, clerk, bailee or servant, except persons under the age of 16 years, of any person, shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make way with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever belonging to any other person or corporation, which shall have come into his possession or under his care, he shall be guilty of a felony, and shall be punished as in cases of larceny.